

IN THE SUPREME COURT OF MISSOURI

No. SC84835

R. MITCHEL BACHTEL and CARY M. BISBEY,

Appellants,

vs.

MILLER COUNTY NURSING HOME DISTRICT,

Respondent.

ON APPEAL FROM THE CIRCUIT COURT OF MILLER COUNTY

Hon. James A. Franklin, Jr.

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellants R. Mitchell Bachtel and Cary M. Bisbey filed separate Petitions for Damages for Wrongful Discharge in the Miller County Circuit Court, alleging that Miller County Nursing Home District (“Nursing Home District”) wrongfully terminated them, citing § 198.070, R.S.Mo. 2000.¹ The Nursing Home District filed motions to dismiss for failure to state a claim because it is a political subdivision of the state immune from such tort claims under § 537.600. The Court granted the motions and entered final judgments dismissing appellants’ tort claims for wrongful discharge with prejudice. Rule 74.01(a).

Appellants filed their Notices of Appeal in the Missouri Court of Appeals, Western District, which had territorial jurisdiction under § 477.070. The Court of Appeals affirmed the Circuit Court’s judgment by opinion and denied appellants’ Motion for Rehearing or in the Alternative, for Transfer to the Missouri Supreme Court. Appellants filed their Application for Transfer in this Court, which transferred the case on November 26, 2002. This Court now has appellate jurisdiction under article V, section 10 of the Missouri Constitution.

STATEMENT OF FACTS

Pursuant to Rule 84.04(f), the Nursing Home District submits these are the facts relevant to the questions presented by this appeal:

R. Mitchell Bachtel was a Quality Assurance Nurse and Wound Care Coordinator and Dr. Cary M. Bisbey was Medical Director at Miller County Care Center, which the

¹ All statutory references are to R.S.Mo. 2000, unless otherwise indicated.

Nursing Home District owns and operates, pursuant to the Nursing Home District Law, §§ 198.200 through 198.350, R.S.Mo. Legal File, at 14, 15, 18, 19. The Nursing Home District is a “body corporate and political subdivision of the state.” Legal File, at 14, 18; § 198.200.2. Bachtel was employed there from February 1995 to October 2000 and Dr. Bisbey served as Medical Director there from September 1997 to October 2000. Legal File, at 1, 15, 19.

On July 27, 2001, Bachtel filed a Petition for Damages for Wrongful Discharge against the Nursing Home District, and on August 2, 2001, Dr. Bisbey filed a Petition for Damages for Wrongful Discharge against the Nursing Home District. Legal File, at 1-13. Bachtel alleges he was an at-will employee and was wrongfully discharged because he “reported the neglect and abuse of residents of the Miller County Nursing Home to the directors of the Miller County Nursing Home district and/or to Missouri Division of Aging.” Legal File, at 1, 4. Dr. Bisbey alleges he had an employment agreement with the Nursing Home District; that he was an at-will employee of the Nursing Home District; and that he was wrongfully terminated “because he had reported the neglect and abuse of residents of the Miller County Nursing Home to the directors of the Miller County Nursing Home District and/or to the Missouri Division of Aging.” Legal File, at 6, 11, 12. Dr. Bisbey also claimed wrongful breach of an employment contract, but dismissed this claim voluntarily on October 12, 2001. Legal File, at 12, 29.

Both appellants state in paragraph 2 of their Petitions for Damages for Wrongful Discharge: “Defendant Miller County Nursing Home District is a body corporate which

exists and operates pursuant to ‘the Nursing Home District Law’ of Missouri, §§ 198.200 to 198.350, RSMo.” Legal File, at 1 and 8. Bachtel includes the text of § 198.070.10 in paragraph 21 of his Petition for Damages. Legal File, at 4. Dr. Bisbey includes the text of § 198.070.10 in paragraph 27 of his Petition for Damages. Legal File, at 10. Neither Petition includes allegations that sovereign immunity, as provided in § 537.600, R.S.Mo., has been waived by the legislature or the Nursing Home District. Legal File, at 1-13. The Nursing Home District filed Answers to both Petitions in which it asserts that appellants have failed to state a claim upon which relief can be granted and pleads its sovereign immunity under § 537.600, as an affirmative defense to appellants’ alleged tort claims for wrongful discharge. Legal File, at 14, 16, 18 and 22.

The Nursing Home District also filed Motions to Dismiss both appellants’ wrongful discharge claims for failure to state a claim upon which relief can be granted because it is a political subdivision of the State of Missouri and immune from such tort claims under § 537.600 Legal File, at 25-28. The Miller County Circuit Court, Honorable James A. Franklin, dismissed both wrongful discharge claims with prejudice because the Nursing Home District is immune from such tort claims by virtue of the doctrine of sovereign immunity. Legal File, at 30, 31. The Court entered judgment on October 31, 2001. Legal File, at 30, 31. Appellants filed their Notices of Appeal in the Missouri Court of Appeals, Western District, on November 28, 2001. Legal File, at 32-37. The Missouri Court of Appeals, Western District, ordered the appeals consolidated on December 18, 2001. The Court of Appeals affirmed the Circuit Court’s judgment in an opinion issued

August 27, 2002, and denied appellants' Motion for Rehearing or in the Alternative, for Transfer to the Missouri Supreme Court on October 1, 2002. Appellants filed their Application for Transfer in this Court, which transferred the case on November 26, 2002.

POINT RELIED ON

I. The Circuit Court properly dismissed appellants' alleged wrongful discharge claims against the Nursing Home District for failure to state a claim upon which relief can be granted because sovereign immunity, as provided in § 537.600, bars these tort claims; the state did not expressly consent to private tort suits for wrongful discharge against Nursing Home Districts in § 198.070.10, § 537.600, or any provision of the Nursing Home Act; and appellants failed to plead any applicable waiver of or exception to sovereign immunity.

State ex rel. Cass Medical Center v. Mason, 796 S.W.2d 621 (Mo. banc 1990).

State ex rel. New Liberty Hospital Dist. v. Pratt, 687 S.W.2d 184 (Mo. banc 1985).

State ex rel. Ripley County v. Garrett, 18 S.W.3d 504 (Mo.App.S.D. 2000), *overruled on other grounds by Amick v. Pattonville Bridgeton Terrace Fire Protection Dist.*, 2002 WL 31863859 (Mo. banc Dec. 24, 2002).

Krasney v. Curators of University of Missouri, 765 S.W.2d 646 (Mo.App. W.D. 1989).

Omnibus Nursing Home Act, §§ 198.003 to 198.186, R.S.Mo.

§ 198.070, R.S.Mo.

§ 198.200, R.S.Mo.

§ 537.600, R.S.Mo.

ARGUMENT

I. The Circuit Court properly dismissed appellants’ alleged wrongful discharge claims against the Nursing Home District for failure to state a claim upon which relief can be granted because sovereign immunity, as provided in § 537.600, bars these tort claims; the state did not expressly consent to private tort suits for wrongful discharge against Nursing Home Districts in § 198.070.10, § 537.600, or any provision of the Nursing Home Act; and appellants failed to plead any applicable waiver of or exception to sovereign immunity.

A. Standard of Review

This is an appeal of the Circuit Court’s judgment that Appellants’ Petitions for Wrongful Discharge fail to state a claim against the Nursing Home District because it is a political subdivision of the state and sovereign immunity bars tort claims against it. This Court examines a dismissed petition “allowing the broadest intendment, treating all facts alleged as true and construing the allegations in favor of the pleader, to determine whether they invoke principles of substantive law which would entitle the plaintiff to relief.” *Hagely v. Board of Educ. of Webster Groves School District*, 841 S.W.2d 663, 665 (Mo. banc 1992). It does not consider matters outside the pleadings or “conclusory

allegations of fact and legal conclusions” to determine “whether a petition states a claim upon which relief can be granted.” *Id.*; Rule 55.27(a).

Appellants pled § 198.070.10 as a basis for their alleged wrongful discharge claims against the Nursing Home District. Legal File, at 4, 10. Appellants now allege that in § 198.070.10, the state expressly consents to private tort claims for wrongful discharge against Nursing Home Districts and thus, they have stated a claim against the Nursing Home District. *See* Appellants’ Substitute Brief, at 12, 14-16. Sovereign immunity is “the rule for all public entities unless a certain prescribed exception is applicable.” *State ex rel. New Liberty Hospital Dist. v. Pratt*, 687 S.W.2d 184, 186 (Mo. banc 1985). Therefore, any purported waiver of sovereign immunity is strictly construed. *McNeill Trucking Co., Inc. v. Missouri State Highway & Transportation Comm’n*, 35 S.W.3d 846, 848 (Mo. banc 2001); *State ex rel. Cass Medical Center v. Mason*, 796 S.W.2d 621, 623 (Mo. banc 1990); *New Liberty*, 687 S.W.2d at 186.

B. Even if appellants’ Petitions for Wrongful Discharge are deemed to allege true facts and the allegations are construed in their favor, sovereign immunity, § 537.600, bars the private tort claims for wrongful discharge asserted in them because § 198.070.10 does not expressly provide the state’s consent to such tort claims and, therefore, appellants have failed to plead a waiver of or exception to sovereign immunity.

Appellants ask the Court to decide an issue that is not ripe for consideration here: whether, in § 198.070.10, the legislature intended to and did create an implied private tort

action for wrongful discharge against all entities subject to regulation under the Nursing Home Act. Therefore, the Nursing Home District has not briefed this issue. If the Court does conclude this issue is ripe for consideration, the Nursing Home District would like an opportunity to brief it fully.

The Nursing Home District, by statute, is a body corporate and political subdivision of the State of Missouri that owns and operates Miller County Care Center. §198.200.2; Legal File, at 14, 18. The Circuit Court dismissed appellants' wrongful discharge claims against the Nursing Home District because it is immune from tort suits. Legal File, at 30, 31. Appellants now claim the Circuit Court erred because the Nursing Home District is subject to regulation under the Nursing Home Act; it is treated the same as other nursing home operators under the Act; the legislature states that "the act shall not be construed to limit the right to seek damages"; and, therefore, § 198.070.10 of the Act contains a waiver of sovereign immunity. Appellants' Substitute Brief, at 12. The legislature, however, has not included a waiver of or exception to sovereign immunity in § 198.070.10 or the Nursing Home Act. A party that relies on a purported statutory exception to or waiver of sovereign immunity must plead facts that show it exists. *Langley v. Curators*, 735 S.W. 3d 808, 811 (Mo.App.W.D. 2002) (quoting *State ex rel. Ripley County v. Garrett*, 18 S.W.3d 504, 509 (Mo.App.S.D. 2000) *overruled on other grounds by Amick v. Pattonville Bridgeton Terrace Fire Protection Dist.*, 2002 WL 31863859 (Mo. banc Dec. 24, 2002), *Brennan by & Through Brennan v. Curators*, 942

S.W.2d 432, 437 (Mo.App.W.D. 1997). Appellants, by pleading § 198.070.10, have not done so.

Liability of a political subdivision such as a Nursing Home District for torts is the exception to the general rule of sovereign immunity. *Cass Medical Center*, 796 S.W.2d at 622; *New Liberty*, 687 S.W.2d at 186. Wrongful discharge claims such as the ones asserted by appellants are tort claims. *Krasney v. Curators*, 765 S.W.2d 646, 650 (Mo.App.W.D. 1989). A political subdivision or other public entity is immune from tort liability absent a “certain prescribed exception” to sovereign immunity. *New Liberty*, 687 S.W.2d at 186. A waiver of or exception to sovereign immunity must be accomplished by the state’s consent to be sued and not by inference or implication. *Fort Zumwalt School Dist. v. State*, 896 S.W.2d 918, 923 (Mo. banc 1995); *New Liberty*, 687 S.W.2d at 187; *Kleban v. Morris*, 247 S.W.2d 832, 836 (Mo. 1952). “The principle that the sovereign cannot be sued without its consent or permission rests upon grounds of public policy, and the law making authority is the proper body to change the public policy and authorize suit against the State.” *Kleban*, 247 S.W. 2d at 836. As this Court has recognized, when the state consents to be sued, it may prescribe the manner, extent, procedure, and any other terms and conditions as it sees fit. *McGehee v. Dixon*, 973 S.W.2d 847, 849 (Mo. banc 1998).

When the General Assembly waives sovereign immunity, it does so explicitly. For example, in § 537.600, it specifically provides that a public entity is subject to tort liability for injuries caused by operation of a vehicle within the course of a public

employee's employment or for injuries caused by a dangerous condition of the entity's premises. In § 537.610, the legislature provides that a public entity that purchases liability insurance for tort claims waives its sovereign immunity to the extent of and for the purposes stated in the insurance policy. Another good example is § 393.720, in which the legislature states:

Any commission established by joint contract under sections 393.700 to 393.770 shall constitute a political subdivision and body public and corporate of the state, . . . but shall not have taxing power nor shall it have the benefit of the doctrine of sovereign immunity.

Waivers of sovereign immunity with respect to costs are also made explicitly:

When the General Assembly waives immunity regarding costs, it does so explicitly: for criminal costs, § 550.020 RSMO 1986; or for unjustified positions by state agencies in contested administrative cases, § 536.087 RSMOSupp.1989. The legislature has enacted several laws about costs in civil cases, none of which authorize awarding costs against the sovereign.

Chap. 514 RSMO.

Richardson v. State Highway & Transportation Comm'n, 863 S.W.2d 876, 882 (Mo. banc 1990).

The only statute plead in appellants' Petitions is § 198.070.10, which provides, in pertinent part:

No person who directs or exercises any authority in a facility shall evict, harass, dismiss or retaliate against a resident or employee because such resident or employee . . . has made a report of any violation or suspected violation of laws, ordinances or regulations applying to the facility which the resident, the resident's family or an employee has reasonable cause to believe has been committed or has occurred. . . .

Section 198.070.10 plainly does not express the state's consent to private tort claims for wrongful discharge against Nursing Home Districts. The legislature does not state in this or any provision of § 198.070 or the Nursing Home Act that it has waived or created an exception to the sovereign immunity of Nursing Home Districts. A waiver of sovereign immunity in § 198.070 or anywhere else in the Act would require the addition of provisions that do not appear there.

The Nursing Home District is immune from tort liability absent a "certain prescribed exception" to sovereign immunity and none appears in § 198.070.10. *New Liberty*, 687 S.W.2d at 186. Thus, appellants, by citing and quoting § 198.070.10 in their Petitions for Wrongful Discharge, have not stated a wrongful discharge cause of action or pled a waiver of sovereign immunity that subjects Nursing Home Districts to potential tort liability. *Ripley County*, 18 S.W.3d at 509; *Cass Medical Center*, 796 S.W.2d at 622-23; *New Liberty*, 687 S.W.2d at 186-87.

C. Section 198.070.10 is unambiguous and not subject to construction, and even if construed as Appellants suggest, it does not contain a waiver of or exception to sovereign immunity and Appellants have not properly pled one by merely citing and quoting the statute.

The statute relied upon by appellants, § 198.070.10, is clear and unambiguous. “There is no room for construction where a statute is clear and unambiguous.” *Ste. Genevieve School Dist. R-II, v. Board of Aldermen*, 66 S.W.3d 6, 11-12 (Mo. banc 2002). “Absent a definition provided in the statute, the court must follow the plain and ordinary meaning of the words themselves.” *Ste. Genevieve School Dist.*, 66 S.W.3d at 11 *citing Ports Petroleum Co., Inc. of Ohio v. Nixon*, 37 S.W.3d 237, 240 (Mo. banc 2001). Missouri courts give effect to statutes as written and cannot add provisions that do not appear in them. *Pollock v. Wetterau Food Distribution Group*, 11 S.W.3d 754, 767 (Mo. App. E.D. 1999). Nevertheless, appellants argue that in this case it is proper to infer from § 198.070.10 the legislature’s intent that all entities subject to regulation under the Nursing Home Act, including political subdivisions of the state, are subject to private tort suits for wrongful discharge and potential liability for damages. Appellants’ Substitute Brief, at 16, 18-19. Thus, they essentially allege that they have stated a claim against the Nursing Home District and demonstrated a waiver of sovereign immunity by citation to § 198.070.10 in their Petitions for Wrongful Discharge.

Appellants’ interpretation would require the Court to read additional provisions into § 198.070, which would include a waiver of or exception to sovereign immunity for

Nursing Home Districts. So rather than identifying a statutory ambiguity that requires construction, appellants have identified a provision that does not appear in the statute.

A waiver of sovereign immunity cannot be inferred where a “certain prescribed exception” does not appear. *New Liberty*, 687 S.W.2d at 186-87. No “prescribed exception” appears in § 198.070. This Court has declared that statutory waivers of sovereign immunity must be strictly construed. *McNeill Trucking*, 35 S.W.3d at 848. The purpose is to “preserve the state’s sovereign rights and protect its capacity to perform necessary governmental functions. *Carpenter v. King*, 679 S.W. 2d 866, 868 (Mo. banc 1984). Yet appellants urge that § 198.070 must be liberally construed to include an exception to sovereign immunity. Appellants’ Substitute Brief, at 13. Appellants argue that there is a waiver or exception in § 198.070.10 because it states “no person . . . shall evict, harass, dismiss or retaliate against a resident or employee. . . .” and “person” includes Nursing Home Districts. Appellant’s Substitute Brief, at 16, 18. Yet the Act does not include a definition of “person” that includes Nursing Home Districts or any language that expresses consent to private tort claims against them for wrongful discharge. While § 198.070.10 does subject the Nursing Home District to sanction by the Department for its violation, that procedure does not, in and of itself, create an exception to sovereign immunity which would permit individuals like appellants to bring their own private cause of action against the Nursing Home District. Appellants further state, “if the legislature had intended for Nursing Home Districts to be immune from civil liability for violations of the Act the statute would reflect that.” Appellants’ Substitute Brief, at

19. This is not the law in Missouri. Sovereign immunity to private tort actions is the rule, not the exception. *New Liberty*, 687 S.W.2d at 186; *Ripley County*, 18 S.W.3d at 509. The state must expressly provide its consent to be sued.

For example, in *State ex rel. New Liberty Hospital District v. Pratt*, this Court held that a statute providing that a hospital district, which is a body corporate and political subdivision of the state, may “sue and be sued” in its own name did not create a statutory exception to sovereign immunity, which would subject it to tort liability. *New Liberty*, 687 S.W.2d at 187. The Court found that the statute, strictly construed, did not indicate that the legislature intended to impose tort liability on hospital districts, but did permit proper claimants to bring other types of claims against the district. *Id.* The same is true of the Nursing Home District and the Nursing Home Act.

In *Krasney v. Curators of University of Missouri*, the Court of Appeals, Western District, rejected a state employee’s argument that the statutory extension of the Workers’ Compensation Law to state employees waived sovereign immunity for retaliatory discharge claims brought under it. *Krasney*, 765 S.W.2d at 650. The Court pointed to § 105.850, which provides the extension of Workers Compensation Law to state employees “shall [not] be construed as acknowledging or creating any liability in tort or as incurring other obligations or duties except only the duty and obligation of complying with the provisions of [the Workers’ Compensation Law].” *Id.* Thus, neither the extension to state employees nor the “duty and obligation of complying” was construed as an express statutory waiver of sovereign immunity. *Id.*

Likewise, in *King v. Probate Division*, the Court of Appeals, Eastern District, affirmed dismissal of a retaliatory discharge claim brought against a public entity under the Workers' Compensation Law. *King v. Probate Division, Circuit Court of the County of St. Louis*, 958 S.W.2d 92, 93 (Mo. App. E.D. 1997). The plaintiff argued unsuccessfully that *Krasney* was wrongly decided because the "duty and obligation of complying with the provisions of the [Workers Compensation Law]" provided in §105.850 is a statutory exception to sovereign immunity. *Id.* These cases demonstrate that public entities may be subject to regulation under a particular act, but immune from tort claims created by it, absent an express waiver of sovereign immunity. *See Krasney*, 765 S.W.2d at 650; *King*, 958 S.W.2d at 93.

Appellants further argue that "the plain meaning" of 198.070.10 and 198.093.6, "is to extend the protections of the Act to employees of all nursing homes covered by its provisions." Appellants' Substitute Brief, at 18-19. § 198.093.6 provides, in pertinent part:

Nothing contained in sections 198.003 to 198.186 shall be construed as abrogating, abridging or otherwise limiting the right of any person to bring appropriate legal actions in any court of competent jurisdiction to insure or enforce any legal right or to seek damages,

The Nursing Home District does not dispute that it is subject to regulation under the Nursing Home Act and subject to potential sanctions if an employee reports a violation of

§ 198.070.10. But the Nursing Home District disagrees with appellants' suggestion that its employees are not protected by the Act if they cannot bring tort actions for damages against it. Even assuming the provisions Appellants cite express the legislature's intent that entities subject to the Nursing Home Act be held liable in tort, and the legislature has thereby created an independent tort of wrongful discharge for violations of 198.070.10, sovereign immunity still bars any such claim against the Nursing Home District. The fact remains that neither § 198.070.10 nor any other provisions of the Act contain express waivers of or exceptions to sovereign immunity. *See Krasney*, 765 S.W.2d at 649-50; *New Liberty*, 687 S.W.2d at 186. Moreover, Courts cannot liberally construe a statute as containing an implied or intended exception to sovereign immunity, as appellants have here, and thereby add a statutory exception where none appears. *See New Liberty*, 687 S.W.2d at 186; *Pollock*, 11 S.W.3d at 767.

CONCLUSION

Appellants have attempted to state tort claims for wrongful discharge against the Nursing Home District. The Nursing Home District has asserted in its Answer and its Motion to Dismiss that it is immune from tort claims for wrongful discharge under § 537.600 and appellants have failed to state a claim upon which relief can be granted. The ruling at issue here is the trial court's decision to dismiss appellants' petitions based on sovereign immunity. Appellants' Petitions for Wrongful Discharge fail to state a claim against the Nursing Home District because neither of them, by pleading § 198.070.10, demonstrates a waiver of or exception to sovereign immunity. No statutory construction

is necessary. Section 198.070.10 plainly does not provide a waiver of or exception to sovereign immunity that would permit appellants' alleged tort claims for wrongful discharge.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

Pursuant to Rule 84.06, I hereby certify that the foregoing Respondent's Substitute Brief complies with the limitations set forth in Rule 84.06(b); and contains 4,701 words, as calculated in accordance with Rule 84.06(b); and that a copy of the brief has been filed with the Court in diskette as required by Rule 84.06 on a diskette that has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Respondent's Substitute Brief and one copy of the diskette containing it were served by mail, this 6th day of January, 2003 on the following counsel of record:

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